No. 83-1350

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH E. MOORE, III AND
KENNETH E. MOORE, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's acquisition of privileged defense materials required dismissal of the indictment, even in the absence of prejudice or intentional misconduct by the prosecutor.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-4a) and the district court (Pet. App. 5a-38a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1983, and the petition for a writ of certiorari was filed on February 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner Moore, Jr. was convicted of conspiring to defraud the government by filing false payment claims in connection with government defense contracts, in violation of 18 U.S.C. 371, and

on 11 false claims counts, in violation of 18 U.S.C. 287. Petitioner Moore, III was convicted on one count of perjury before the grand jury, in violation of 18 U.S.C. 1623.[1] Moore, Jr. was sentenced to a six-month term of imprisonment and to a $55,000 fine. Moore, III was sentenced to two years' probation and to a $2,000 fine. The court of appeals affirmed the convictions (Pet. App. 1a-3a).

1. The evidence at trial showed that between 1977 and 1980, petitioners, who are father and son, owned and managed Issachar Manufacturing Co. (Issachar) and Reuben Garment International Co. (Reuben) in Little Falls, New York. The sole source of business for both companies was government defense contracts. Issachar manufactured military clothing, and Reuben produced tents and related equipment (Tr. 211-212, 931-937).[2] On certain of the defense contracts held by Issachar, Moore, Jr. filed a series of false claims for progress payments that misrepresented expenses allegedly incurred by the company for materials, and payments were made on the basis of those false claims (Tr. 1041-1044, 1053-1060, 2273). Issachar and Reuben ultimately defaulted on two defense contracts, which resulted in a loss to the government of approximately $2.9 million (Tr. 2384-2387). In addition, during the investigation in this case, Moore, III lied to the grand jury concerning $1,000 that had been improperly diverted from one of petitioners' companies (Tr. 663-665, 981-983, 1089-1092, 2198-2209).

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[1]Moore, Jr. was acquitted on 123 false claims counts, and the district court granted his motion for a judgment of acquittal on the conspiracy count and on one perjury count. Co-defendant Anthony Freddoso was acquitted on the two counts (conspiracy and perjury) against him.

[2]Petitioners also owned and operated three other related companies that were financed strictly with funds derived from government payments to Issachar and Reuben (Tr. 1245-1266, 2373-2374).

2. a. On the eve of trial in September 1982, petitioners and co-defendant Freddoso moved the district court to dismiss the indictment on the ground that the prosecutor allegedly had improperly obtained and retained a box containing documents compiled by Freddoso and Moore, Jr. to assist in their defense. The facts adduced at the hearing on that motion, as summarized in the district court's opinion (Pet. App. 5a-17a), showed that in late March or early April 1982, Freddoso brought to attorney Anthony J. LaFache's office certain documents he had prepared to assist in the defense. Most of the documents (Defense Exhibits A-T) were contained in a cardboard box, and other documents (Court Exhibits 2-5) were contained in a separate folder that was placed on top of the box.[3] Freddoso left the box and folder in a corner of LaFache's office. A few weeks later, the prosecutor and an FBI agent went to LaFache's office to pick up documents that the government previously had provided to the defense team. LaFache directed them to approximately 18 boxes piled on a stairway landing a few feet from LaFache's office. With LaFache's assistance, the prosecutor and FBI agent loaded the boxes into a government vehicle (Pet. App. 9a-14a).

Approximately five months later, in September 1982, co-defendant Freddoso went to LaFache's office to retrieve the box of defense materials, but it could not be found in the office of any of the defense counsel. On September 22, 1982, defense counsel called the prosecutor concerning the box

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[3]As described by the district court (Pet. App. 10a & n.3), Defense Exhibits A-T are folders containing charts, checks, and other documents or corporate records. Court Exhibit 2 is a "twenty-two (22) page document in which Freddoso sets out certain defenses to the indictment against all the defendants and supports his arguments with specific references" to Defense Exhibits A-T. Court Exhibits 3-5 are letters written by Freddoso and Moore, Jr. to defense attorney Kenneth P. Ray, LaFache's partner.

and was informed that the prosecutor had come across some materials that he believed might belong to the defendants. Five days later, defense counsel picked up the box containing Defense Exhibits A-T at the United States Attorney's Office. The prosecutor denied having possession of the folder containing Court Exhibits 2-5. The prosecutor also represented that he was unaware of the government's possession of the box until September 1982 and that he did not immediately distinguish the documents contained in the box from the thousands of documents that had been produced by the defendants pursuant to grand jury subpoena (Pet. App. 14a-17a).

b. Following an eight-day hearing, the district court entered an order barring the government from using on its direct case or for impeachment specific statements, data, or defense arguments contained in the documents (with the exception of Defense Exhibit M-1), except to the extent the contents had been independently elicited and developed by the prosecution in connection with the case (Pet. App. 8a-9a). However, the court denied petitioner's motion to dismiss the indictment. Finding that the evidence "does not present a case of misconduct by either side," the court rejected the government's argument that the defense had planted the defense materials in the United States Attorney's Office, and likewise rejected the defense claim that the government had stolen the materials (Pet. App. 10a, 14a-16a). The court instead held that "the box [in issue] was inadvertently placed in the hands of the prosecution when [the prosecutor and FBI agent] lawfully and with permission retrieved the approximately eighteen other boxes of documents from LaFache's law office" (*id.* at 18a). The court also credited the prosecutor's testimony that he was not aware of the box until September, that he did not immediately recognize the documents, and that he never viewed Court Exhibit 2, which was the 22-page document in

which co-defendant Freddoso set out certain defenses, supported by references to the documents contained in the box of defense exhibits (*id.* at 16a, 18a-19a).[4]

In addition, although the court concluded that a number of the documents contained in the box were merely "pre-existing corporate documents [that] would have been available to the Government" pursuant to Rule 16 of the Federal Rules of Criminal Procedure, it held that the documents contained in the separate folder (Court Exhibits 2-5) and certain documents in the box constituted privileged, non-discoverable material (Pet. App. 22a-23a). The court, however, rejected defendants' contention that the government's access to the privileged documents required dismissal of the indictment.

The court found that "there was no deliberate or intentional misconduct on the part of the prosecutor in obtaining and viewing the documents," and it therefore concluded that "no deterrence purpose would be served by * * * dismissal of the indictment" (Pet. App. 27a). Moreover, the court held that under *United States* v. *Morrison*, 449 U.S. 361 (1981), the prosecutor's unintentional exposure to the privileged materials did not warrant dismissal because there was "[n]o prejudice or substantial threat of prejudice" to the

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[4]The court also recounted the testimony of an auditor with the Defense Contract Auditing Agency that he was telephoned by the prosecutor on September 15, 1982 but was unable to determine from the prosecutor's description over the telephone whether the documents belonged to the government. The auditor was unable to go to Utica to inspect the documents until September 20, at which time he determined that the documents were not the government's records but that certain of them were corporate records that should have been turned over in response to the grand jury subpoena. Pet. App. 17a. The court observed that "[o]nce [the auditor] was called in and determined that certain of the documents should not be in the Government's possession, those documents were returned to Policelli and Freddoso in Utica on a mutually convenient date" (*id.* at 19a).

defense (Pet. App. 27a, 32a). The court explained (*id.* at 30a-32a) that the information contained in the documents had been disclosed by the defendants during their grand jury testimony and that the court's own review of the grand jury proceedings established that the prosecutor was "well aware" of the information at that stage of the case. Finally, the court noted that its order prohibiting the government from using the documents at trial for any purpose "will clearly prevent even the most minute possibility that the defendants will suffer any prejudice from what has occurred" (*id.* at 32a-33a).

3. The court of appeals affirmed (Pet. App. 1a-4a). The court stated that although it did not condone the prosecutor's retention of the defense documents without notifying counsel, it affirmed the convictions on the basis of the district court's findings that " 'there was no deliberate or intentional misconduct on the part of the prosecutor' " and, "[o]f greater significance," that "[petitioners] were not prejudiced by [the] prosecution's conduct" (Pet. App. 2a).

ARGUMENT

The courts below addressed the unfortunate incident that occurred in this case with care and sensitivity. Their treatment of the issue was correct and does not conflict with any decision of this Court or any court of appeals. Further review of this fact-bound issue therefore is not warranted.

1. Petitioners contend (Pet. 10-13) that the indictment should be dismissed because they "could not have received a fair trial once the prosecution had the defense material in question" (Pet. 10). This contention is belied by the concurrent finding by the courts below that "[petitioners] were not prejudiced by [the] prosecution's conduct" (Pet. App. 2a). As the district court pointed out, the prosecution was already "well aware of the information contained in [the] documents [in question]," and therefore gained no advantage from them (Pet. App. 32a). Moreover, as the district

court further noted, the prosecution was prohibited from using the documents in question at trial, thereby "prevent-[ing] even the most minute possibility that [petitioners could have] suffer[ed] any prejudice" (*id.* at 32a-33a). Petitioners cite nothing to suggest that the district court's suppression of the documents and information contained in them was insufficient to prevent any prejudice from resulting or that the determination by the courts below that petitioners in fact suffered no prejudice was erroneous.

Especially in light of these findings, the decisions of this Court relied upon by petitioners (Pet. 12-13) plainly do not support their contention that the indictment should be dismissed. In *Black* v. *United States,* 385 U.S. 26 (1966), and *O'Brien* v. *United States,* 386 U.S. 345 (1967), there had been surreptitious electronic surveillance by the government of attorney-client communications, in violation not only of the attorney-client privilege but of the Fourth Amendment. In each case, the conviction was reversed and a new trial ordered; the court did not, however, order the indictment dismissed, as petitioners urge here. Moreover, in *Black,* even the more limited relief of a new trial was ordered only "so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible" and to enable the district court to pass on the question, since that court had not known of the surveillance at the time of trial. 385 U.S. at 29. In *O'Brien,* the Court did not write further, but simply cited *Black.* 386 U.S. at 345. Thus, as this Court subsequently has made clear, a new trial was ordered in *Black* and *O'Brien* only because of the possibility that the illegal surveillance might have had an effect on the trials. See *Weatherford* v. *Bursey,* 429 U.S. 545, 551-552 (1977). "If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether

the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." *Id.* at 552.

Here, unlike in *Black*, the trial court was informed prior to trial of the prosecution's access to defense materials, which, furthermore, was not the product of any unlawful search. The court then held extensive hearings on the question, barred the use of the materials at trial, and found that petitioners were not prejudiced by the incident. Since here, unlike in *Black* and *O'Brien*, the district court took measures prior to trial to assure that the incident would have no effect on the trial, there is no basis in this case even for the more limited relief of a new trial ordered in *Black* and *O'Brien*. Indeed, it would be pointless to order a new trial, because petitioners have not suggested any additional measures not taken at the first trial that the district court might take at a second trial to guard against use of the materials.

Nor does *Weatherford* v. *Bursey, supra*, upon which petitioners also rely (Pet. 12), support their position. That case was a damage action under 42 U.S.C. (Supp. V) 1983 based on an informant's presence at a conversation between a criminal defendant and his lawyer. The Court held that there had been no Sixth Amendment violation at all, because there was no tainted evidence in the case, no purposeful intrusion, and no communication of information to the prosecution. 429 U.S. at 554-559. Here, too, there was no tainted evidence used at trial, and the courts below found no intentional misconduct by the prosecutor (Pet. App. 2a-27a). Although here, unlike in *Weatherford*, the prosecutor did have the documents in his possession, the district court found that the prosecutor was previously "well aware of the information contained in these documents" and that accordingly "[n]o prejudice or substantial threat of prejudice" resulted (Pet. App. 32a). In these circumstances, there is no reason to doubt that the district court's ruling barring

the use of the materials was fully sufficient to remedy whatever Sixth Amendment violation might have occurred under *Weatherford* v. *Bursey, supra,* as a result of the prosecutor's possession of the documents.

The fourth of this Court's decisions upon which petitioners rely, *United States* v. *Morrison,* 449 U.S. 361 (1981) (see Pet. 12), actually reinforces the conclusion that neither dismissal of the indictment nor a new trial is appropriate in this case. The Court stressed in *Morrison* that the remedy for a Sixth Amendment violation "should be tailored to the injury suffered" and should not unnecessarily infringe upon the competing interest in the administration of criminal justice. 449 U.S. at 364. Thus, where evidence has been obtained in violation of the Sixth Amendment, the appropriate remedy is to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted at trial. *Id.* at 364-365. "Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding * * *. More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *Id.* at 365 (footnote omitted). Since the courts below found no prejudice or substantial threat thereof and since the documents obtained were in any event suppressed, there is no basis for dismissing the indictment or for imposing any other remedy in the instant proceedings even if, contrary to the finding below, the prosecutor's acquisition of the materials had been deliberate.[5]

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[5]Petitioners acknowledge (Pet. 14) that existing case law seems to require a showing of prejudice when prosecutorial misconduct is alleged (see also *Smith* v. *Phillips,* 455 U.S. 209, 219-220 (1982); *United States* v. *Agurs,* 427 U.S. 97, 110 (1976)), but they urge the Court to make "new law" by placing the burden on the prosecutor to show an absence of prejudice in order to avoid the need for the court to "read the mind of the prosecution" (Pet. 15). This case would not furnish an appropriate

2. Petitioners contend (Pet. 6-9) that the indictment should have been dismissed in this case under a prior Second Circuit decision indicating that that remedy might be available, even if the defendant was not irreparably injured, in order to " 'help translate the assurances of [the] U. S. attorneys into consistent performance by their assistants.' " Pet. 7 (quoting *United States* v. *Fields*, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979), and *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972)). But whether the court of appeals should have followed dicta in a prior opinion concerning the appropriate exercise of its supervisory power obviously presents no question for review by this Court. Moreover, the Second Circuit stressed in *Fields* that dismissal would be appropriate "only when the pattern of misconduct is widespread or continuous." 592 F.2d at 648. Even assuming a court may dismiss an indictment on this ground (but cf. *United States* v. *Morrison*, 449 U.S. at 366 n.2), there is no basis for such drastic action here. There was no deliberate or intentional official misconduct in this case, as both courts below held, let alone any pattern of " 'widespread or continuous' " misconduct. Compare *United States* v. *Brown*, 602 F.2d 1073, 1078 (2d Cir.), cert. denied, 444 U.S. 952 (1979).

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vehicle for consideration of this novel submission even if the Court were disposed to consider abandoning its precedents requiring that the defendant show prejudice in order to obtain relief. Irrespective of who might bear the burden of proof, the courts below found that no prejudice resulted in this case. And as noted above (see pages 5-6, *supra*), the district court's finding that no prejudice resulted was in turn based upon that court's own review of the documents and grand jury proceedings, which demonstrated that the government learned nothing new, and gained no advantage, from the defense documents. Thus, it was not necessary to read the mind of the prosecutor. Moreover, the rule petitioners urge would be especially inappropriate where, as here, the prosecutor's acquisition of the materials was found to be unintentional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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